Supreme Court, U.S.
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No. 99-96

In The

Supreme Court of the United States

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL NO. 324, AFL-CIO, CLC,

Petitioner,

-against-

K.V. MART COMPANY d/b/a TOP VALU MARKETS and VALU PLUS FOOD WAREHOUSES, a corporation; and MARKET VENTURE, LLC,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the District Court abused its discretion by awarding One Thousand Four Hundred Forty Three Dollars and Seventy Five Cents ($1,443.75) in attorneys' fees to Respondents pursuant to 28 U.S.C. §1447(c) and 29 U.S.C. §185 when the Petitioner removed a third and identical matter to federal court after two prior remand orders?

PARTIES

Petitioner: United Food and Commercial Workers Union, Local 324, AFL-CIO, CLC.

Respondents: K.V. MART COMPANY d/b/a TOP VALU MARKETS and VALU PLUS FOOD WAREHOUSES, a corporation; and MARKET VENTURE, LLC.

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RELIEF REQUESTED

Respondents respectfully request that this Court deny the United Food and Commercial Workers Union, Local No. 324, AFL-CIO, CLC's Petition for Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit was rendered on April 14, 1999, and is reported at 173 F.3d 1221; 161 LRRM 2001. The opinion affirms the Order of the United States District Court for the Central District of California, which was filed on June 24, 1997, and was unpublished.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

1. Rule 10 of the Rules of the Supreme Court of the United States provides in relevant part:

> A petition for a writ of certiorari will only be granted for compelling reasons. The following . . . indicate the character of the reasons the Court considers: (a) a United States court of appeals has entered a decision in conflict with

the decision of another United States court of appeals on the same important matter; . . . (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals; (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court . . .

2. 28 U.S.C. §1447(c) states:

" . . . If at any time before final judgment, it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State Court. The State court may thereupon proceed with such case."

3. 28 U.S.C. §1447(d) states:

"An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to §1443 of this title shall be reviewable by appeal or otherwise."

4. Section 301(a) and 301(b) of the Labor Management Relations Act, 1947 ("§301(b)"), 29 U.S.C. §185(a) and (b) provide in relevant part:

"Suits by and against labor organization.

(a) Venue, amount and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments.

Any labor organization which represents employees in any industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and on behalf of the employees whom it represents in the courts of the United States . . . "

STATEMENT OF THE CASE

From December, 1996, to February, 1997, the United Food and Commercial Workers International Union, Local 324 ("Local 324" or "Petitioner") picketed Respondent K.V. Mart Company's food warehouse in Lynwood, California ("Lynwood store") located in a shopping center owned by Respondent Market Venture, L.L.C. (collectively "Respondents"). Just after the grand opening of the

Lynwood Store on December 5, 1996, Petitioner engaged in mass picketing of the Lynwood Store as part of its effort to negotiate a labor contract with K.V. Mart. During the course of the picketing, Petitioner harassed employees and customers of the Lynwood Store, frightened and intimidated them, and blocked their entrance and exit to the store. Therefore, damages and injunctive relief were sought by Respondents to stop Local 324's tactics.

Respondents filed three successive suits against Local 324 in state court to enjoin or restrict unlawful picketing occurring at Respondent's Lynwood store and at other store locations. Before each hearing on the preliminary injunction, Local 324 removed each action to federal district court on the theory that the "may sue and be sued" clause contained in §301(b) of the Labor Management Relations Act, 1947, as amended, 29 U.S.C. §185 ("LMRA"), confers original federal subject matter jurisdiction over *any suit* by or against a union – whether or not the matter involves a purely state law cause of action. Petitioner concedes in its Petition that Respondents' "cause of action" arises exclusively under state law that has not been preempted by any federal law.

In *each* of the three actions, the district court concluded that §301 confers jurisdiction *only* over suits for *breach of a union contract or collective bargaining agreement*, as set forth in §301(a), and remanded the cases to state court. In the third remand order, the district court awarded Respondents attorneys' fees and costs pursuant to 28 U.S.C. §1447(c), on the ground that Local 324 did not have a reasonable basis for removal in light of the two prior remand orders. Local 324 appealed the sanctions

order to the Ninth Circuit Court of Appeals, which affirmed the District Court's Order.

SUMMARY OF ARGUMENT

Local 324 misstates the question presented for review and Respondents, therefore, file this opposition to object to and correct a misstatement of fact and law that bears on what issues properly would be before the Court if certiorari is granted.

The sole issue presented for review is whether the district court abused its discretion by awarding one thousand four hundred forty-three dollars and seventy five cents ($1,443.75) in attorneys' fees to Respondents pursuant to 28 U.S.C. §1447(c) and 29 U.S.C. §185 in light of the two prior remand orders? The issue on review is *not* whether the District Court properly remanded the case to state court based upon lack of subject matter jurisdiction.

In fact, although it is undisputed by the parties that a remand order is not appealable, Local 324 has manipulated its appeal of the sanctions award in an attempt to overturn 40 years of case law in favor of a decision holding that LMRA §301(b) confers subject matter jurisdiction over suits brought by or against a union.[1]

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[1] Although Local 324 argued to the District Court and the Ninth Circuit Court of Appeals that LMRA § 301(b) conferred jurisdiction over *any* suit, it has now revised this theory. It now claims that § 301(b) confers jurisdiction only over cases where picketing and free speech are involved or where the cause of action touches "some basic tenet of federal labor policy." Thus,

Respondents submit that the District Court was within its discretion in awarding sanctions of attorneys' fees against Local 324 because, as Local 324 has fully admitted in its Petition, the sanctions were awarded only after the District Court had found on two prior, almost identical, occasions that the District Court lacked subject matter jurisdiction in these actions. On each occasion, the Petitioner's argument for federal subject matter jurisdiction was based on an argument repeatedly rejected by the courts. Nevertheless, Petitioner knowingly proceeded with its removal in an obvious and substantial waste of not only the court's time, but also in an obvious means to delay Respondents' attempts at obtaining an injunction and forcing Respondents to expend unnecessary attorneys' fees and costs. It is important to note that Local 324 does not dispute the amount of the fee award; nor does it argue that sanctions are not warranted in this situation. Rather, Petitioner focuses on whether the district court had subject matter jurisdiction over this matter – a clear attempt to appeal the remand order.

Petitioner ignores the simple fact that on each and every occasion of attempted removal, the subject actions did "not involve a dispute between a labor union and employer over an existing contract;" nor did "they involve a dispute between labor unions." Therefore, according to §301(b) of the Labor Management Relations Act, 1947, 29 U.S.C. §185(b) (hereinafter "§301" or "29 U.S.C. §185(b)") the federal court did not have subject

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it concedes that "traffic cases," for example, would not properly be brought in federal court.

matter jurisdiction, and twice decided against such removal.

In view of Petitioner's unconscionable bad faith tactics, conducted in the face of the Court's two (2) prior orders, Respondents justifiably sought their costs and expenses, including attorneys' fees, incurred as a result of the attempted third removal. The district court justifiably and properly used its discretion and awarded a portion of the requested amount as sanctions against the Petitioner.

ARGUMENTS AND AUTHORITIES

In summary, the district court did not abuse its discretion in awarding sanctions where Petitioner removed this case, along with the prior identical actions, for a third time after the court had twice decided against such removal.

A. PETITIONER MISSTATES THE ISSUES IN THE UNDERLYING APPEAL.

As stated above – and as Petitioner freely admits in its Petition – Petitioner has used the sanctions order to obtain review of the District Court's decision to remand the case to state court. However, it is well settled that review of the underlying remand order is barred as it is not a final order. 28 U.S.C. §1447(d) (1982); *Peabody v. Maud Van Cortland Hill Schroll Trust*, 892 F.2d 722, 773 (9th Cir. 1989).

Local 324's petition, therefore, sets forth no compelling reasons why the petition for writ of certiorari should be granted. Petitioner has failed to set forth a conflict

between courts of appeals on the same important matter, to set forth a conflict between state courts of last resort on an important federal question, or to show that a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. Since none of these considerations apply here, the petition for writ of certiorari should be denied.

B. PETITIONER'S THIRD REMOVAL REGARDING THE SAME ISSUE BETWEEN THE SAME PARTIES SHOWED THE REQUISITE BAD FAITH TO WARRANT SANCTIONS.

A party filing an improper notice of removal may be sanctioned under either Rule 11 of the Rules of the Supreme Court of the United States or 28 U.S.C. §1447. *Ballard's Service Center, Inc. v. Transue*, 865 F.2d 447, 449 (1st Cir. 1989). Federal courts have inherent equitable powers to assess attorneys' fees as sanctions against a party whose litigation conduct is found to be "vexatious" or in "bad faith." *See, Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766-767, 100 S.Ct. 2455, 2464 (1980). (*See also, Peabody v. Maud Van Cortland Hill Schroll Trust, supra*, 892 F.2d at 776 – second removal after prior remand and no intervening changes in case subjected Defendant to sanctions.)

Title 28, §1447(c) further provides, in pertinent part: *An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a*

result of the removal (emphasis added). *See, Pollard & Picket v. Dwight*, 8 U.S. 421, 2 L.Ed. 666 (1808). (On award of just costs, *see, Pack v. Rich Terminal Co.*, 502 F.Supp. 58 (1980) and *Alaska v. General Ins. Co.*, 826 F.Supp. 309 (1993)).

An award of attorneys' fees and costs for improper removal is reviewed for abuse of discretion. *Moore v. Permanente Med. Group, Inc.*, 981 F.2d 443, 447 (9th Cir. 1992).

As stated above, review of the underlying remand order is barred because it is not a final order. 28 U.S.C. §1447(d) (1982); *Peabody v. Maud Van Cortland Hill Schroll Trust, supra*, 892 F.2d at 773. However, Local 324 argues that sanctions against it were not warranted because their petition for removal was properly supported by federal law. "Where, as here, a [party] is sanctioned for being frivolous, effective review of the sanctions requires examination of the moving party's 'good faith belief in the merit of a legal argument.' " *Id.* at 774-775, citing *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 830-831 (9th Cir. 1986).

In *Peabody*, the Ninth Circuit noted that it is a fine line walking between review of the underlying sanctions order and the remand order. The Court stated,

> "This fine line is not one we need to walk in the context of this case because we find the arguments [Defendant] made in the . . . Petition for Removal had been rejected previously by the district court. A second presentation of the same, previously rejected theory to the same court fairly defines 'frivolous.' Unless [Defendant] can show some relevant change subsequent to the first remand, the sanctions award was proper."

Repeated applications for removal have been held improvident in various situations. For instance, removal is improper if based on a federal claim that is already pending before the court in a different action. *Walton v. UTV of San Francisco*, 776 F.Supp. 1399 (1991). In *Walton*, removal was held to be improper where it would lead to "an endless series of filings and removals defeating both the Court's determination of its supplemental jurisdiction and the State court's ability to deal with the claims before them." *Id.*

Here, the situation is substantially similar to that decided by the Ninth Circuit in *Peabody*. Local 324 removed two previous cases to federal court which involved identical factual and legal issues. Each time, Petitioner argued that the court had subject matter jurisdiction under LMRA §301(b), and each time, Respondent's motion to remand was granted. Yet, even after its argument was twice rejected, Local 324 *again* removed a *third*, identical case to federal court, setting forth the exact same argument that had been previously rejected by the same court.

As the District Court stated in its order, "On two previous occasions, this Petitioner removed virtually identical cases to federal court." On both occasions, the district court remanded the action to state court. Petitioner certainly knew that this case was not properly removable to federal court. Despite Petitioner's attempt to disguise the matter otherwise, the blatant refusal to recognize the two prior remand orders was itself proper grounds, and within the discretion of the district court to justify the award of sanctions. By the third attempt at removal, Local 324 could not have harbored a good faith

belief that its third removal was any more proper than the first two. As stated by the Ninth Circuit, such conduct *"defines 'frivolous' "* and sanctions are awardable.

The underlying policy consideration of *Walton, supra,* also warrants close examination of the pattern of conduct exhibited by Local 324. A state court must be able to deal with claims before it. The series of improvident removals that promises to continue if not deterred, renders the state court's power to issue temporary restraining orders useless, both in the expected twenty-one (21) day duration, as well as for a precursor to a preliminary injunction. The "endless series of filings and removals" warned against in *Walton, supra,* has already occurred between these parties. The district court agreed that the conduct was in bad faith, especially in light of the outcome of the two (2) previous suits. Such misuse of the removal statute rendered the State court impotent to deal with the claims before it.

Because the narrow issue presented is whether the District Court properly awarded sanctions for frivolous removal – and the answer is clearly "yes!" – the question of whether LMRA §301(b) grants subject matter jurisdiction is not properly before this court on an appeal from an award of attorneys' fees and costs. Therefore, Local 324's petition should be denied.

C. PETITIONER'S REMOVAL IN THIS CASE WAS GROSSLY IMPROPER

Assuming, *arguendo,* that the Court does find that it must consider LMRA §301(b) to decide whether to grant

Local 324's petition for a writ of certiorari, then Respondents call the Court's attention to Title 28 §1447(c) which provides, in pertinent part:

> If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. *See, Pollard & Picket v. Dwight,* (1808) 8 U.S. 421, 2 L.Ed. 666.

As discussed above, the remedies outlined in Title 28 §1447(c) are appropriate in this instance as to Petitioner's conduct of improper removal of this action.

In support of removal, Petitioner relies primarily on §301 of the *Labor Management Relations Act* (29 U.S.C. §185) which provides, in pertinent part:

> Subpart (a) – *Suits for violation of contracts* between an employer and a labor organization . . . *may* be brought in any district court . . . Subpart (b) – Any such labor organization . . . *may sue or be sued . . . in the courts of the United States.*

However, as the district court has noted on three occasions, the instant case does not concern any union contract or any collective bargaining agreement. Petitioner admits this point. Consequently, subpart (a), on its face, is not applicable to the set of facts at hand. However, Local 324 tries to read into §301(b) a requirement that any cause of action touching "some basic tenet of federal labor policy" must be filed in federal court – even though a contract is not involved.

In *Kayser-Roth Hosiery Co., Inc., Dayton Div. v. Textile Workers Union of America AFL-CIO, et al.,* 285 F.Supp. 484

(1968), the court, in considering a virtually identical factual situation, made the following observation:

> In the present lawsuit it is clear that no contract or collective bargaining agreement is involved under the allegations of the Complaint. It is likewise clear that if jurisdiction is dependent upon subsection (a), the action must be a suit "for violation of contract." Upon a diligent search of the cases the Court is unable to uncover a single case, wherein jurisdiction was solely predicated upon *29 U.S.C. §185*, that did not involve an allegation of a contract or a collective bargaining agreement as the basis of the lawsuit. *Id.* at 486.

Similarly, the court, citing *Avco Corp. v. Aero Lodge No. 735*, 376 F.2d 337, 339-340 (6th Cir. 1967), continued:

> Section 301 of the Labor Management Relations Act, 29 U.S.C., §185, confers jurisdiction upon the District Court without regard to diversity of citizenship or jurisdictional amount to enforce *collective bargaining agreements* in industries affecting interstate commerce (emphasis in original). *Id.* at 487.

Finally, the court concluded:

> Absent an allegation of some contract or agreement between the parties, this Court would not have jurisdiction under 29 U.S.C. §185. Section 301 does not give the federal courts power to hear a controversy just because a "labor dispute" exists nor because of the identity of one of the parties as a "labor organization." *Id.* at 488.

Since there has been no allegation that the parties to this lawsuit have entered into a contract or collective

bargaining agreement, 29 U.S.C. §185 is simply not implicated, despite Petitioner's status as a labor union. *See also, Publix Supermarkets Inc. v. United Food and Commercial Workers Int'l Union*, 900 F.Supp. 419 (M.D. Florida 1995), citing *Woodell v. International Brotherhood of Electrical Workers, Local 71*, 502 U.S. 93, 98, 112 S.Ct. 494, 498 116 L.Ed.2d 419 (1991).

Petitioner appears to espouse the view that subparts (a) and (b) of §185 somehow operate in the disjunctive, i.e., that satisfaction of either subpart will confer this Court with original jurisdiction of this matter. Petitioner, hence, relies solely on subpart (b), i.e., "[Local 324] *may sue or be sued* as an entity . . . in the courts of the United States." 29 U.S.C. §185(b). However, the Supreme Court stated in *Textile Workers v. Lincoln Mills*, 353 U.S. 448 at 451-452, 77 S.Ct. 912 at 915, 1 L.Ed.2d 972 (1957), that this contention is without merit. The Supreme Court held the sections are *conjunctive* as follows:

> From the face of the Act it is apparent that §301(a) and §301(b) [29 U.S.C. §185(a) and 29 U.S.C. §185(b)] supplement one another. Section 301(b) makes it possible for a labor organization . . . to sue or be sued in the federal courts. Section 301(b) in other words provides the procedural remedy lacking at common law. Section 301(a) certainly does something more than that. Plainly, it supplies the basis upon which the federal district courts may take jurisdiction and apply the procedural rule of §301(b). *Id.*

Therefore, Petitioner cannot circumvent the requirement of 29 U.S.C. §185(a) that requires, at a minimum, an allegation of some contract or collective bargaining

agreement, *the jurisdictional requirement*, which is not present in this case. By contending only that as a labor organization it can sue or be sued in the United States, *the procedural remedy*, Petitioner falls far shy of meeting the standard for proper removal.

With respect to subpart (b), the "may sue and be sued" language, Petitioner also misapplies its chief authority to effect removal of this action as within the original jurisdiction of the district court. In *American National Red Cross v. S.G. and A.E.*, 505 U.S. 247, 112 S.Ct. 2465, 120 L.Ed.2d 201 (1992), the Supreme Court held certain "sue or be sued" language contained in the Red Cross' charter, 36 U.S.C. §2, "confers original jurisdiction on federal courts over all [state law] cases to which the Red Cross is a party." Petitioner contends that the "sue or be sued" language in 29 U.S.C. §185(b) "is virtually identical" to 36 U.S.C. §2, and thus, this district court has original jurisdiction over the present state law action. Nevertheless, the "sue or be sued" language is different in the case at hand, and is expressly distinguished as not having the same jurisdiction conferring power as that used in the Red Cross charter:

> The cases support the rule that a congressional charter's "sue and be sued" provision may be read to confer federal court jurisdiction if, but only if, it specifically mentions the federal courts. *American National Red Cross v. S.G. and A.E.*, (1992) 505 U.S. 247, 112 S.Ct. 2465 at 2471, 120 L.Ed.2d 201.

In that case, the "sue or be sued" provision read as follows:

> [Red Cross is authorized] to sue and be sued in courts of law and equity, *State or Federal*, within the jurisdiction of the United States (emphasis added.) *Id.*

Of marked importance is the court's own explanation, by way of example, of the degree of specificity required for a jurisdictional grant. The following "sue or be sued" provisions do not confer federal court jurisdiction, but operate as a "mere grant . . . of the normal corporate capacity to sue":

5. [T]o sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in courts of record, or any other place whatsoever. *Bank of the United States v. Deveaux*, (1809) 5 Cranch 61, 3 L.Ed. 38.

6. [T]o sue and be sued, plead and be pleaded, defend and be defended, in all courts of law and equity within the United States. *Bankers Trust Co. v. Texas and Pacific R. Co.*, (1916) 241 U.S. 295, 36 S.Ct. 569, 60 L.Ed. 1010.

The following provisions, however, do confer federal court jurisdiction as there is an express grant of jurisdiction:

7. [T]o sue and be sued in courts of law and equity, State or **Federal**, within the jurisdiction of the United States. *American National Red Cross v. S.G. and A.E.*, (1992) 505 U.S. 247, 112 S.Ct. 2465 at 2471, 120 L.Ed. 201.

8. [T]o sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in all state courts having competent jurisdiction, and in **any circuit court** of the United States. *Osborn v. Bank of the* ____

United States, (1824) 9 Wheat. 738, 6 L.Ed. 204.

9. [To sue or be sued] in any court of law or equity, State or **Federal**. *D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.*, (1942) 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956.

In sum, where there is a failure to mention the courts of the union, an express federal reference, the provision will be held merely to give a general capacity to sue, but not a right to sue, in federal court.

In the final analysis, the language of 29 U.S.C. §185(b) is virtually identical to the language used in *Bankers Trust Co. v. Texas and Pacific R. Co.*, 241 U.S. 295, 36 S.Ct. 569, 60 L.Ed. 1010 (1916), number "2" above, not *American National Red Cross v. S.G. and A.E.*, 505 U.S. 247, 112 S.Ct. 2465 at 2471, 120 L.Ed. 201 (1992), and the result should be the same. "In the Courts of the United States" simply does not contain the required language for a grant of original federal court jurisdiction.

CONCLUSION

For all of the foregoing reasons, in the interest of justice, Respondents respectfully request that Local 324's Petition for a Writ of Certiorari be denied; or in the alternative, that the Ninth Circuit Court of Appeals' decision be affirmed and that Respondents be awarded their reasonable attorneys' fees and costs herein.

Respectfully submitted

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